



United States Department of State

Washington, D.C. 20520

NOV 14 2007

Dear Mr. Chairman:

Thank you for the opportunity to provide the views of the Department of State on H.R. 3887, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007.

The Department shares Congress's goal of striving to abolish all forms of human trafficking, a modern-day form of slavery. We appreciate the renewed attention the bill places on the trafficking of persons for purposes of forced labor. The Department is deeply concerned, however, that certain provisions would constrain the Secretary's ability to employ sanctions as a flexible tool of foreign policy.

The Department opposes provisions that seriously undermine the discretionary authority of the Secretary of State over the placement of countries in the Tier rankings, by mandating the automatic placement of Tier 2 Watch List countries in Tier 3 after a stated period of time. We also oppose provisions that legislate the A3/G5 visa categories, as they infringe upon the Secretary's authority and have the potential to adversely impact bilateral relations.

The Department also has serious reservations about broadening the coverage of the annual TIP report to include all countries, rather than current requirements for reporting only on countries with a significant number of victims. The Department opposes the bill's amendment to the Trafficking Victims Protection Act of 2000 (TVPA), vesting in the Director sole responsibility over funding decisions. This would derogate from the Secretary's authority to delegate such responsibilities to appropriate senior personnel.

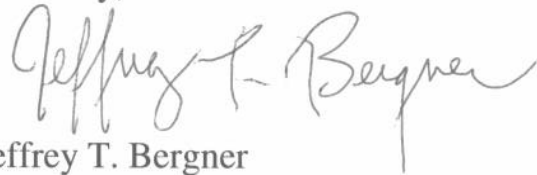
The Honorable
Tom Lantos, Chairman,
Committee on Foreign Affairs,
House of Representatives.

For these reasons, the Department of State cannot support the bill as currently crafted but looks forward to working with Congress to shape legislation that meets shared objectives while preserving the flexibility needed by the Secretary to advance an effective foreign policy. More detailed concerns about specific legislative provisions are set out in the attached section-by-section analysis.

Please feel free to contact me about this or any other matter of interest.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the presentation of this letter.

Sincerely,

A handwritten signature in cursive script, reading "Jeffrey T. Bergner". The signature is written in dark ink and is positioned above the printed name and title.

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

Enclosure:

As stated.

Attachment: Specific Comments

Title I – Combating International Trafficking in Persons

1. Section 102. Office to Monitor and Combat

Subsection (a): The Department opposes the amendment in section 102 to section 105(e)(2)(D) and 105(e)(3) of the Trafficking Victims Protection Act of 2000 (TVPA), as they are inconsistent with the Secretary's authority to manage the Department of State, and to provide and direct the provision of foreign assistance. In this regard, the Department opposes and requests the deletion of new section 105e(2)(D) which vests sole responsibility over funding decisions in the Director, in a manner inconsistent with the Secretary's authority to decide which official shall make funding and related decisions within the Department. Moreover, if amended TVPA section 105(e)(3) were retained in some revised (e.g., hortatory form, the following language should be added at the end: “, and shall not be subject to the provisions of the Federal Advisory Committee Act, P.L. 92-463, 5 U.S.C. App. 2.”

Subsection (e)(2)(D) limits the ability of regional bureaus to use appropriated Economic Support Funds or similar funds to address trafficking in countries where G/TIP is not actively funding cooperation or through regional organizations in which the U.S. is a member.

2. Section 103. Prevention and Prosecution of Trafficking in Foreign Countries.

These mandates, cast as authorizations, are duplicative of existing discretionary State authorities, and they should be revised to be hortatory.

3. Section 105. Increasing Effectiveness of Anti-Trafficking Programs

Subsection (b): The Department opposes new TVPA subsection 107A (a), as the current procedures in place adequately address these issues, and, to the extent this new subsection creates ambiguities, it increases litigation risk. Moreover, new subsection 107(A)(a)(2) presents a technical problem

to the extent it provides that contracts, grants, and cooperative agreements shall be awarded “on a full and open competitive basis, consistent with existing law.” It would be helpful if it were clarified that exceptions to full and open competition in relevant law, the Competition in Contracting Act, 41 U.S.C. 253, continued to be available.

This year, a new foreign assistance process was introduced at DOS. G/TIP has advocated throughout this process for the use of the TIP Report as strategic guidance for prioritizing all foreign assistance grants. In G/TIP funding, priority is given to countries placed on Tier 2 Watch List and Tier 3, which demonstrate a substantial need for donor funds and the political will to address the issue. However, it is also important to preserve the ability of G/TIP, and the Department as a whole, to support the development of a variety of programs including “model approaches and programs” that can be replicated in other countries and to address the specific identified issues in Tier 2 countries that endanger the Tier rating.

The Department should have the flexibility to make such grant awards and not be restricted from doing so by the TVPRA. The continued ability to award non-competitive grants on a limited basis should be preserved. As the Department is placing considerable attention on program performance and evaluation in order to promote best practices in the field, the insertion of specific program performance requirements in the TVPRA is unnecessary.

4. Section 106. Minimum Standards for the Elimination of Trafficking

Subsection (a)(1) eliminates the language “a significant number of.” Previously, the TVPA mandated that only countries with a “significant number of victims of severe forms of trafficking” be included in the Tier rankings. The Department has interpreted that statutory threshold to include countries with approximately 100 such victims.

We strongly prefer that the threshold language stay in place because it allows the focus of anti-trafficking efforts to be maintained on those countries that have a significant problem. Also, if the new requirement were retained it could be viewed as implying that the Secretary has not, in practice, cast a wide enough net to scrutinize trafficking in countries of concern, and could constrain the Secretary’s discretion to focus on whether a certain country meets the criteria to be in the Report. Any perceived

underreporting of the number of victims in prior years has been addressed by additional personnel to ensure that countries are covered when they deserve to be in the Report

Subsection (b)(1)(B) specifies the criteria for consideration of a country's serious and sustained efforts to eliminate severe forms of trafficking in persons. One of the most critical criteria for determining whether a government is making serious and sustained efforts to eliminate severe forms of trafficking should be whether the government vigorously investigates, and prosecutes acts of severe forms of trafficking, and convicts and sentences persons responsible for such acts. Sentences actually imposed on convicted offenders should involve significant jail time, with a majority of cases resulting in sentences on the order of one year's imprisonment or more, but taking into account the severity of an individual's actions, sentences imposed for other grave crimes, and the judiciary's right to hand down punishments consistent with that country's laws.

We believe the Secretary should retain the flexibility, however, to determine that a government is making serious and sustained efforts to eliminate severe forms of trafficking even in cases where sentences are suspended or significantly reduced, as they may be appropriate in particular cases, depending on the needs and assessments of the relevant law enforcement officials. We therefore oppose the bill's above changes to current law which changes would eliminate such discretion.

Subsection (b)(4) appears to link the reduction of demand for commercial sex acts and for participation in international sex tourism by nationals of the country. The Department believes clarification is needed to separate the two focuses of this provision so countries actively working to prevent international sex tourism, but have legal commercial sex industries in-country, are not disadvantaged.

5. Section 107. Actions Against Governments Failing to Meet Minimum Standards.

Subsection (a): The new TVPA section 110(b)(3)(D) requires that a country that is on Tier 2 Watch List for two consecutive years be (1) placed in Tier 3; or (2) be subject to a determination by the Secretary as described in that section. We appreciate that the inclusion of the Tier 2 Watch List in

the ranking system was intended to warn countries that they are not meeting the minimum standards and in danger of falling to Tier 3.

While understanding the frustration over countries remaining too long on the Tier 2 Watch List, the Department does not support this change in the TVPRA 2007. Automatic Tier 3 placement undermines the Secretary of State's authority and discretion to make a decision about a country's ranking. To automatically downgrade a country's tier ranking after two years provides a disincentive for that country to make sustained efforts against trafficking. Automaticity does not take into account significant measures undertaken by governments to improve their performance, but that nevertheless may not be sufficient to justify removing the country from the Watch List. In addition, it would deny the Secretary the power to encourage resource-starved developing countries to make the incremental improvements that are within their capability to make.

Implementing changes to meet the minimum standards of the TVPA often requires time, particularly under difficult conditions, such as scarce resources, governmental transitions, large influxes of population, etc. The current report's process already provides an adequate structure and method for making tier judgments based on facts.

6. Section 110. Responsibilities of Consular Officers at the Department of State.

Section 110(a) of the TVPRA 2007 would add obligations to the current responsibilities of consular officers that are inherently part of the process of adjudicating an alien's qualifications for a visa classification, and admissibility would significantly increase the time required to process each application in the several nonimmigrant classifications listed in section 202(h), and would have an impact on all visa processing with fewer visas processed daily, and fewer interviews scheduled each day. The providing of the specified information to an alien who plans to work or study in the United States should be kept separate from the consular decision making process of whether to issue or deny a visa. We recommend that the heading for Section 110 be changed from "Responsibilities of Consular Officers at the Department of State" to "Responsibilities of the Department of State."; that the caption of subsection (a) be changed to "Review of Pamphlet Prior to Interview."; and that Sections 110(a)(1) and (2) be revised to provide that the review of the pamphlet and determination of the alien's understanding of

its contents be made by a post trafficking in persons prevention officer prior to the visa interview. It is also recommended that the trafficking in persons officer inform applicants who are provided a pamphlet that prostitution is a crime under the laws of the United States.

Section 110(b) delineates special provisions relating to employees of diplomats issued A3 and G5 visas. In particular, it outlines the process of denial of A3 and G5 visas when a determination is made that previous worker(s) have been subject to trafficking or worker exploitation by any member of the applicable mission and mandates certain reporting requirements.

The Department cannot support this proposal even though it is deeply concerned about allegations that some diplomats' domestic workers are being mistreated in ways that are so severe as to constitute human trafficking. Our seriousness of purpose is demonstrated in part by the Department's policy of seeking a waiver of diplomatic immunity when the Department of Justice informs it that, but for immunity, the Justice Department would seek to indict a diplomat on criminal charges related to trafficking. If a waiver is not granted, we require the individual to leave the U.S. and to permit return only to face charges.

The Department strongly urges that the provisions in this section with regard to the A3/G5 visa category of workers be deleted for a number of reasons. They impose restrictions on visa issuance that are inappropriate. For example, the provisions purport to penalize an entire diplomatic mission because of the alleged misconduct of just one of its members. They require the Department to do things we cannot do, such as making determinations regarding criminal conduct. They would also saddle us with burdensome and unnecessary reporting requirements – for example, we already report to Congress instances when waivers are requested for suspected criminal behavior of foreign diplomats in the United States. And, they would interfere with the Department's ability to deal effectively with the diplomatic community on issues of great sensitivity and importance to the conduct of diplomatic functions.

The Department urges that this provision be stricken and that the Department retain its discretion to continue our efforts to address this issue without being hindered by such legislation, which could be counterproductive. We have a number of actions under consideration, and

can assure you that we are looking for ways to be more effective in this area. The Department will be providing the House Foreign Affairs Committee and the Senate Foreign Relations Committee a separate summary of current and planned measures to deal with the matter of diplomats accused of treating domestic workers in a manner meeting the definition of TIP.

Finally, legislating about the A3 and G5 visa categories outside the context of the Immigration and Nationality Act can make the visa provisions less coherent and more difficult to administer. We can suggest appropriate amendments to the INA A3 and G5 visa categories if we find them necessary to permit us to address this issue. We do not see a need for such amendments at this time, however.

Title II – Combating Trafficking in Persons in the United States

7. Section 201. Protecting Trafficking Victims Against Retaliation

At the core of USG anti-trafficking efforts is the human rights principle that victims of trafficking must be protected from further trauma. This victim-centered approach prioritizes both the provision of medical care, counseling, shelter, and restoration assistance, as well as reasonable cooperation with prosecutors to convict traffickers. As to the proposed changes in the bill to the requirement that victims cooperate with reasonable law enforcement requests, we defer to DOJ. We also refer to Justice comments on this and other provisions principally within their bailiwick, including section 211.

8. Section 202. Information for Work-based Nonimmigrants on Legal Rights and Resources.

The Department cannot support the definition of “employment-or education-based nonimmigrant visa” in Subsection (h). This definition, for the purpose of identifying those nonimmigrant visa applicants who must receive information from the pamphlet, is overly broad and not calculated to apply to those categories of applicants who are most at risk of being victims of trafficking or worker exploitation. The information required to be provided will be entirely irrelevant to many of the visa recipients covered, making the U.S. visa process subject to criticism. For example, the definition includes L-1 visas, which are for intra-company transferees (managers, executives, or aliens having

specialized knowledge), and H-1B visas, which are for aliens in specialty occupations (required to possess at least a bachelor's degree or the equivalent). The list of visa classes to receive the information does not include those B-1 visa applicants who are domestic servants seeking to accompany or follow employers who are either U.S. citizens subject to frequent international transfers on temporary assignment to the United States or nonimmigrant aliens. The Department recommends that Subsection (h)(1) be revised to change "employment- or education-based nonimmigrant visa" to "nonimmigrant visa applicant groups who must review the information pamphlet" and to give the Secretary of State, in consultation with the Secretary of Homeland Security, the authority to define, by regulation, those groups of nonimmigrant visa applicants who must receive the information. Conforming changes to the terminology would also be needed in sections 110(a)(1), 110(a)(3), 202(a), 202(b), 202(b)(1), 202(d)(1), and 202 (d) (2).

9. Section 233. Senior Policy Operating Group.

This amendment would eliminate flexibility of the agencies to report to the SPOG. We oppose it as it would constrain the discretion and flexibility of the Secretary of State.

10. Section 236. Enhancing Efforts to Combat the Trafficking of Children.

While we support the objective of ensuring that federal employees are sensitive in their dealings w/ unaccompanied alien children, we object to the mandate that the Secretary of State provide specialized training in this regard.

11. Technical Changes: Assistance for Victims of Trafficking in Other Countries

Reference in amended TVPA section 107(a)(1)(F) to "International Organization of Migration" should be to the "International Organization for Migration."

12. Sections 401-407. Child Soldier Prevention Act of 2007

These provisions pose serious concerns for the State Department, as expressed in Department of State letter of May 31, 2007 to the Chairman and ranking member of the Senate Foreign Relations Committee. The letter expressed Department objections particularly to the failure to accurately reflect certain international legal requirements to the restrictions on foreign assistance and to duplicative reporting, as the Department already reports on such matters as part of its annual Trafficking in Persons Report, as well as our Human Rights Report.